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In the Supreme Court of the United States

October Term, 1970

No. 747

E. E. MARSHALL, Administrator of the Estate of MATHEW A. MARSHALL, deceased,
Petitioner,

vs.

HOLLYWOOD, INC. et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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BRIEF REVIEW — 221-0000 — 371-4131

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In the Supreme Court of the United States

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No. _____

E. E. MARSHALL, Administrator of the Estate of MATHEW A. MARSHALL, deceased,

Petitioner,

vs.

HOLLYWOOD, INC. et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of The United States of America:

The petition of E. E. Marshall, Administrator of the Estate of Mathew A. Marshall, deceased for a writ of certiorari to review a judgment of the Supreme Court of Florida made and entered by said court on the 13th day of May, 1970, and a judgment denying a petition for rehearing made and entered on June 30, 1970, copies of each of which are hereto appended, respectfully shows to this honorable court:

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the trial court.

The opinion of the District Court of Appeal of Florida, Fourth District, annexed hereto as Appendix F, is reported at 224 So.2d 742, and at page 752 thereof is its order certifying its decision to the Supreme Court of Florida as passing upon a question of great public interest to both the Bench and the Bar as well as the general public.

The opinion of the Supreme Court of Florida, annexed hereto as Appendix A has not been reported officially.

The petition for re-hearing, attached hereto as Appendix B, was filed on May 28, 1970.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the date of its entry are May 13, 1970.

The petition for rehearing was timely filed on May 28, 1970, and the order denying the petition for rehearing, annexed hereto as Appendix C, was entered on the 30th day of June, 1970, on which date the judgment became final and effective.

There was no order granting an extension of time within which to petition for certiorari.

The case involves the denial of equal protection of the laws and due process of law to Petitioner in contravention of the provisions of the Fourteenth Amendment to the Constitution, Section 1.

The statutory provision believed to confer jurisdiction upon this court to review the judgment of the court below is United States Code, Title 28, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

Where the Supreme Court of Florida has held in a line of decisions under the recording statutes that forged and wild deeds are not entitled to recording and that no owner of real property will suffer loss of his title by reason of forged or wild deeds, even though erroniously and unlawfully recorded, it is a denial of equal protection of the laws to hold in this case that Petitioner suffers loss of his title by reason of forged and wild deeds even though the Supreme Court has not receded from its former decisions.

Is the Supreme Court's interpretation of the Marketable Record Title Act, which expressly preserves the line of decisions under the recording statutes, so unreasonable, arbitrary and capricious as to constitute a denial of due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

The Fourteenth Amendment to the Constitution, Section 1, provides as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." United States Code, Constitution, Amendment 14.

The state statutes involved in this case are Section 695.01, F.S.A. (the recording statute), attached hereto as Appendix D, and Ch. 712, F.S.A. (Marketable Record Title Act), attached hereto as Appendix E.

STATEMENT OF THE CASE

Petitioner began this action in the Circuit Court of Broward County, Florida as Administrator of the Estate of Mathew A. Marshall, deceased, seeking a decree establishing his equitable title in land claimed by defendants, the appointment of a trustee to convey legal title to the heirs of the estate, and confirmation of the ownership of two-thirds of the stock of Atlantic Beach Co. by the estate. On a motion to dismiss the trial court held the action to be barred by the Marketable Record Title Act. The Court of Appeal, Fourth District, affirmed this decision holding that the Act conferred marketability on a chain of title beginning with a forged deed followed by wild deeds under which Defendants claimed. The Supreme Court affirmed this decision.

Mathew Marshall died in 1923 owning two-thirds of the shares of stock of Atlantic Beach Co., which owned all of the land in question. Shortly thereafter probate of his

estate was begun with forged documents which failed to list this stock among his assets, and simultaneously therewith a deed was forged conveying all of the land from Atlantic Beach Co. Several wild deeds followed thereafter building a chain of title ultimately leading to defendants. The corporation was purportedly dissolved by a court decree of dissolution, which was based upon forged documents, but the corporation was not actually dissolved until 1936 and then by proclamation of the governor for failure to pay corporate taxes. The estate was still open in 1966 when Petitioner discovered these facts which for the purpose of ruling on the motion to dismiss were assumed to be true by the courts.

STAGE OF THE PROCEEDINGS IN THE STATE COURTS AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED

The federal question was first raised by Petitioner in his petition for rehearing filed with the Clerk of the Supreme Court of Florida on May 28, 1970, a copy of which is annexed hereto as Appendix B. The federal question first became apparent as a result of the opinion of the State Supreme Court in that it refused to apply its previous applicable decisions under the recording statutes on which the Petitioner has relied and also in that it placed a completely unanticipated and unconstitutional construction on the Marketable Record Title Act.

The unconstitutional nature of its interpretation and construction was specifically pointed out to the Supreme Court of Florida in the petition for rehearing.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The Federal Question has been timely raised.

Petitioner respectfully shows to the Court that this is a case of great interest to the Bench and Bar as well as to the general public. All titles to real property in Florida have heretofore been protected by the courts against loss by forgery, and despite a clear legislative intent expressed in the Marketable Record Title Act to preserve such prior decisions the State Supreme Court has ignored those principles in this case.

The petition for rehearing afforded Petitioner the first opportunity to raise the federal question of denial of equal protection of the laws and due process by reason of the court's ignoring its prior decisions on which Petitioner has relied. This Court has held that the raising of the federal question in a petition for rehearing under these circumstances is timely. Brinkerhoff-Faris Co. vs. Hill (1930), 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

There is also a second ground for the conclusion that the federal question has been timely raised in that the Court's construction of both the Marketable Record Title Act and the state recording statutes was completely unanticipated. International Steel Co. vs. Surety Co. (1936), 297 U.S. 657, 56 S.Ct. 619, 80 L.Ed. 961. This point arose in great Northern Ry Co. vs. Sunburst Oil and Refining Co. (1932), 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, where Mr. Justice Cardozo succinctly stated the objection:

"The second is a challenge to the Constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the Petitioner could not make in advance of the event." (ibid, p. 149)

II. PETITIONER HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS

The applicable sections of the recording statutes are attached as Appendix D. They require the recording of conveyances in order to be valid and effective as between claimants to property, and place duties upon the recording clerk.

In interpreting these recording statutes, the Supreme Court of Florida in Wright vs. Blocker (1940), 198 So. 88, held a forged deed recorded 28 years prior to the court's decision to be void, of no effect and not entitled to recordation under the recording statutes. It stated:

"It is settled law that the mere recordation of a forged deed does not affect the title to land as our recording statues apply solely to genuine or lawful instruments."

"It is immaterial what the good faith of the party claiming under a forged deed may be, as no person can be deprived of his property by a forged deed. It is only instruments that have some validity and that may in some manner affect real estate that can be recorded legally.

> Of course a forged deed is not entitled to record and if such a deed is recorded it cannot affect the title to land. (ibid p. 90)"

In Poladian vs. Johnson (1955), 85 So.2nd 140, the Supreme Court of Florida in holding a wild deed to be void and not entitled to recordation stated:

> "A 'wild deed' is one executed by a stranger to the record title hung out in the air like 'Mahomet's (sic) coffin'." (ibid p. 140)

In Reed vs. Fain (1962), 145 So.2nd 858, the Supreme Court reaffirmed this line of decisions and stated:

> "It is well established that the recordation of a void deed does not constitute constructive notice of 'anything.' Wright vs. Blocker, supra. See also Poladian vs. Johnson. (Fla. 1955), 85 So.2nd 140. It is a mere 'brutum fulmen' signifying nothing." (citing Macbeth, Act V, Scene 5).

Section 712.07 of the Marketable Record Title Act specifically preserves the ruling of the Supreme Court's decisions cited above, by stating:

> "712.07 Limitations of actions and recording acts. Nothing contained in this law shall be construed . . . to affect the operation of any statute governing the effect of the recording or the failure to record any instrument affecting land . . ."

CONCLUSION

By virtue of Section 7 of the Marketable Record Title Act specifically preserving the decisions of the Supreme Court of Florida interpreting the meaning and effect of the recording statutes the only conclusion which may be drawn is that defendants' chain of title begins with a forged deed followed by wild deeds. None of these deeds were ever entitled to recordation and therefore could never become roots of title under Chapter 712.03(1), F.S.A. which requires roots of title to be instruments recorded according to law and free of defects inherent in the muniments thereof. Even the requirement of a liberal construction stated in Sec. 712.10 makes it subject to these limitations.

This court has held that even though a statue is fair on its face, there will be a denial of equal protection from its application in an arbitrarily discriminatory manner. In holding that "the equal protection of the laws is a pledge of the protection of equal laws "this Court stated in Yick Wo vs. Hopkins (1886), 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064, at p. 1073:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

A study of the decisions of this court and the highest state courts reveals that the question of what is a denial

of equal protection of the laws is not always easily determined, but there emerges from the cases the guarantee that the rights of all persons must rest upon the same rule under similar circumstances and that the guarantee applies to the exercise of all the powers of the state which can affect the individual or his property.

III. THE SUPREME COURT'S INTERPRETATION OF THE MARKETABLE RECORD TITLE ACT IS UNREASONABLE, ARBITRARY, AND CAPRICIOUS CONSTITUTING A DENIAL OF DUE PROCESS OF LAW

A. Legislative History

It has been shown above that the court's decision invidiously discriminates against Petitioner in denying equal protection. Its wholly unwarranted construction of the Act constitutes a re-writing thereof and a denial of due process of law. The court completely ignored the legislative history as is shown by the following comparison of House Bill No. 2478 (1961 session) which failed to pass and the law as enacted:

House Bill No. 2478 (1961 session)

"Section 1. Marketable Record Title

Any person having the legal capacity to own land in this state who, together with his predecessors in title has an unbroken chain of title of record to any estate in land for 30 years or more, shall have a Marketable Record Title to such estate . . ." (emphasis added)

Florida Statutes Ch. [redacted]

> Any person having the legal capacity to own land in this state, who, alone or together with his predecessors in title, has been vested with any estate in land of record for thirty years or more, shall have a Marketable Record Title to such estate . . . " (emphasis added)

We agree that this action would never have been instituted had House Bill No. 2678 (1961) become the law, because it would have done exactly what the Court says the law as passed has accomplished. There is a substantial difference. Marketability is conferred only upon deeds which vest an estate and not upon any chain of title simply because it is erroniously and unlawfully recorded.

B. Re-Written Definitions

The court re-wrote definitions contained within the act and ignored its own prior decisions as to the effect of forged and wild deeds despite the clear language of Section 712.07, F.S.A., supra. The definitions of the Act are as follows:

> "712.01 Definitions—As used in this law:
>
> (2) Root of title means any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least thirty years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded.

(3) Title transaction means any recorded instrument or court proceeding which affects title to any estate or interest in land."

In Wright vs. Blocker, supra, the court stated that:

". . . of course a forged deed is not entitled to record and if such a deed is recorded it cannot affect the title to the land. . . ." (198 So. 90)

The same thing was said as to wild deeds by the same Court in Poladian vs. Johnson, supra.

C. Abandonment of its Rule of Interpretation

The court stated in Wright vs. Blocker, supra, concerning interpretation of a statute which in clear language validated all deeds and wills of record for 20 years, that:

"The statutes here involved (the 20 year statute and recording acts) should not be interpreted by this court to be the instrumentality or vehicle by which designing or unscrupulous persons could obtain a forged deed, cause the same to be recorded and after the expiration of the twenty years prescribed by statute, successfully assert claims thereunder in a court of chancery." (198 So. 90)

The Court found it convenient to ignore this rule in the instant case.

CONCLUSION

A statute which can be read to ignore the express command of Section 712.07 preserving prior court decisions; can ignore definitions contained within the statute itself and can as a result thereof equate the right of one who "has been vested with any estate in land of record" with one who has a "chain of title of record" is so ambigious and vague as to clothe the Supreme Court with power to confer or withhold marketability upon any deed depending upon its whims. As it now stands, the statute offers a "choice of uncertainties."

This court stated, in Roller vs. Holly, 176 U.S. 398, 44 L.Ed. 520, 20 S.Ct. 410 at p. 413, that "the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." And in Connally vs. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322, this court stated that ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." In Cramp vs. Board, 386 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d 285, this court recently held it to be objectionable that the statute was so indefinite that the Supreme Court of Florida could read the element of "scienter" into each proscribed offense.

The Act could have been so construed as to give effect to every provision including Sec. 712.07. It is an elementary principle imbedded in thousands of decisions that the court should have adopted the construction which would have avoided denial of equal protection of the laws and would have upheld it. 16 Am Jur 2nd, Sec. 145. Its unreasonable, arbitrary and capricious construction constitutes a denial of due process.

CONCLUSION

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of Florida to the end that the judgment of the Supreme Court of Florida may be reviewed and reversed by this Honorable Court.

E. E. Marshall, Petitioner

By _____

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, I have this 22nd day of September, 1970, mailed copies of the foregoing Petition to each of the attorneys of record listed in the caption of the opinion of the Supreme Court of Florida. (Appendix A)

E. E. Marshall, Petitioner

By _____

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1970

CASE NO. 38,889

E. E. MARSHALL, as Administrator de bonis non of the Estate of Mathew A. Marshall, deceased,
Petitioner,

vs.

HOLLYWOOD, INC., a Florida corporation, et al.,
Respondents.

Opinion filed May 13, 1970

Writ of Certiorari to the District Court of Appeal, Fourth District

Garland M. Budd and Lewis Moore, Miami, for appellant.

Sherwood Spencer of Ellis Spencer and Butler and Beckerman and Beckerman, Hollywood, for Appellees-Hollywood, Inc.; Sherwood Investment Co.; Frances E. Kane and Joanna Kane, his wife; and Alvin Kohn, a single man.

Donald J. Lunny of Sutton James Bielejeski & Lunny, Fort Lauderdale, for Appellees-Joseph DiBari; J. Petruzelli and Vera Petruzelli, his wife; G. DeChiaro and Mary DeChiaro, his wife; Mildred Garber and H. N. Garber; Lester Lehn; Simon Garzina and Amelia Garzina; Ray-

mond Mohr and Alberta Mohr; Ralph E. Luebbers and Viola L. Luebbers; Robert G. Sabella and Lorraine T. Sabella.

A. C. Paoli of Paoli and Paoli, Hollywood, for Appellees-W. W. Bradley and Gaynelle Bradley Leggett; James Damoto and Mrs. James Damoto; A. J. De Stefan and Wilhelmina DeStefan, his wife; Walter Farrar and Mrs. Walter Farrar, his wife; E. H. Foster and Irma Foster, his wife; C. Napoli and Theresa Napoli, his wife; Robert M. McKee and Ruth M. Amadon, sole heirs at law of F. B. McKee and Mrs. F. B. McKee, his wife.

Herbert L. Nadeau of Shutts & Bowen, Miami, for Appellee-W. Douglas Hall.

Leonard Romanik of Landerfeld and Romanik, Hollywood, for Appellees-F. C. Brodbeck and Bernice Brodbeck, his wife; M. Constaminon and Anna Constaminon, his wife; H. A. Friedman and Lena L. Friedman, his wife; G. H. Hamilton and Mrs. G. H. Hamilton, his wife; J. Houting and Mildred Houting, his wife; Addie G. Izzec; Frank R. Wheaton and Helen M. Wheaton, his wife; Arthur W. Kellner and Charlotte M. Kellner, his wife; C. H. Landefeld, Jr., Dorothy D. Landefeld, J. J. McDevitt and Lillian M. McDevitt, his wife; E. Mabelle Otten, Robert Pentland, Jr., and Mrs. Robert Pentland, Jr., his wife; Jack Siegel and Mrs. Jack Siegel, his wife; Albert J. Tarrson and Mrs. Albert J. Tarrson, his wife; L. Walker and Alberta Walker, his wife.

William R. Dawes of Dawes & Lummus, Miami, for Appellee-Grace Woods Asbury, a widow.

William F. Leonard of Coleman Leonard Morrison & Riddle, Fort Lauderdale, for Appellees-Mary Borduk; E. Cruz and Lidia Cruz, his wife; Joseph T. McHale and Catherine McHale, his wife; Ernest H. Wood and Carolyn M. Wood, his wife; and Eleanor Herboth.

Richard H. Cobourn, Hollywood, for Appellees-S. L. Devier and Fredericka Devier.

Leon A. Epstein, Miami Beach, for Appellees-Edward N. Birk and LaSalle National Bank, as co-executors of the Estate of William J. Birk, and Lillian Birk.

Edmund S. Pendzisz, Miami, for Appellees-Luigi DeMaio and Mrs. Luigi DeMaio, his wife.

Charles E. Booth of Booth & Booth, Daytona Beach, for Appellee-Helena Tennant.

Elliott B. Barnett and Michael H. Gora of Ruden Barnett McClosky & Schuster, Fort Lauderdale, for Appellees-Margaret T. Hynes and her successors in interest including Margaret M. Maguire, Edward J. Hynes and Walter F. Hynes; John Darco and Annette Darco, his wife.

E. T. Hunter, Hollywood, for Appellee-City of Hollywood.

Ronald P. Anselmo of Fleming O'Bryan & Fleming, Fort Lauderdale, for Appellees-Damaris H. Carney; Marjorie H. Bosley and Virginia Ruff.

John H. Lewis, Hollywood, for Appellee-Estate of Susan D. Kater.

Robert C. Scott of Cabot Scott Wenkstern & Casteel, Fort Lauderdale, for Appellees-M. N. Diener and Rae B. Diener, his wife; Joseph Gassib and Marion Gassib, his wife; Thomas Devanis and Ghidotti Devanis, his wife; Ted Devanis, Jr., a single man; Joseph T. McHale and Mrs. Joseph T. McHale, his wife.

Francis K. Buckley of Buckley & Bland, Fort Lauderdale, for Appellees-Helen Anna O'Toole and Carol O'Toole; Catherine Benci; R. Popp, also known as Russell LeRoy Popp, Catherine Popp; Gerald B. Bauman, as conservator of the Estate of Helen S. Leith, Incompetent; Gertrude K. Johnson and Emma Anderson; Catholic Society of Religious and Literary Education.

Raymond E. Thompson, Hollywood, for Appellees-Raymond A. Wilcox, also known as R. A. Wilcox, and Katinka Ozee, as co-executors of the Estate of Ella Jo Stollberg Wilcox, Deceased; R. A. Wilcox, also known as Raymond A. Wilcox, a single man, individually; Katinka Ozee, formerly Katinka Stollberg, individually J. V. Smith and Dovie Smith, his wife, and J. L. Smith and Isobel Smith, his wife.

Robert E. Dubow of Walden and Dubow, Dania, for Appellees-Mendel R. Harris and Malvina Babes.

Paul Game, Tampa, Parks M. Carmichael, Gainesville, and David P. Catsman, Miami, for The Florida Bar as Amicus Curiae.

CARLTON, J.:

We now review an application of the Marketable

Record Titles to Real Property Act, Chapter 712, Florida Statutes. The District Court of Appeal, Fourth District, has certified that its decision in this cause, reported at 224 So.2d 743, is one which passes upon a question of great public interest. The District Court held, in effect, that the Act confers marketability to a chain of title arising out of a forged or a wild deed, so long as the strict requirements of the Act are met. We affirm this decision.

The complex facts involved in this case have been presented extensively and with clarity in the opinion of the District Court. We will only briefly summarize these facts. In 1912 Mathew Marshall and Carl Weidling owned a large tract of land in South Florida. In 1913 they organized and incorporated the Atlantic Beach Company. They transferred their property interests in the large tract to the Company, and in return they received two-thirds and one-third, respectively, of the Company's total authorized and issued stock, in direct proportion to their initial ownership interests in the tract. Marshall and Weidling were the sole officers of the Company and they alone participated in its stock.

Mr. Marshall died in December 1923, leaving Louise Marshall as his widow and sole surviving heir. Mrs. Marshall was totally unaware of her husband's interests in the Company, and within a month after his passing, she left the State without ever returning. After her departure, a man named Frank M. Terry, apparently aided and abetted by certain associates, set into motion a clever scheme calculated to defraud the Marshall estate of all interests in the Company and its property. Although there is some question as to exactly who played what part in

this scheme, for purposes of this opinion we shall ascribe all responsibility to Mr. Terry.

Within a few days after Mrs. Marshall's departure, Terry forged her name to an Application for Letters of Administration concerning Mathew Marshall's estate. Letters were subsequently issued by the County Judge, Dade County, to Mrs. Marshall and Terry received them. About this same time, Terry wrote up certain "Minutes of Dissolution of Atlantic Beach Company" and he also prepared a deed conveying all of the Company's property to himself and others residing out of the State, who were alleged in the spurious Minutes to be the remaining stockholders of the Company. Thereafter, these Minutes were purportedly acknowledged, and the deed conveying all of the Company's property was executed by those who were alleged to be the stockholders.

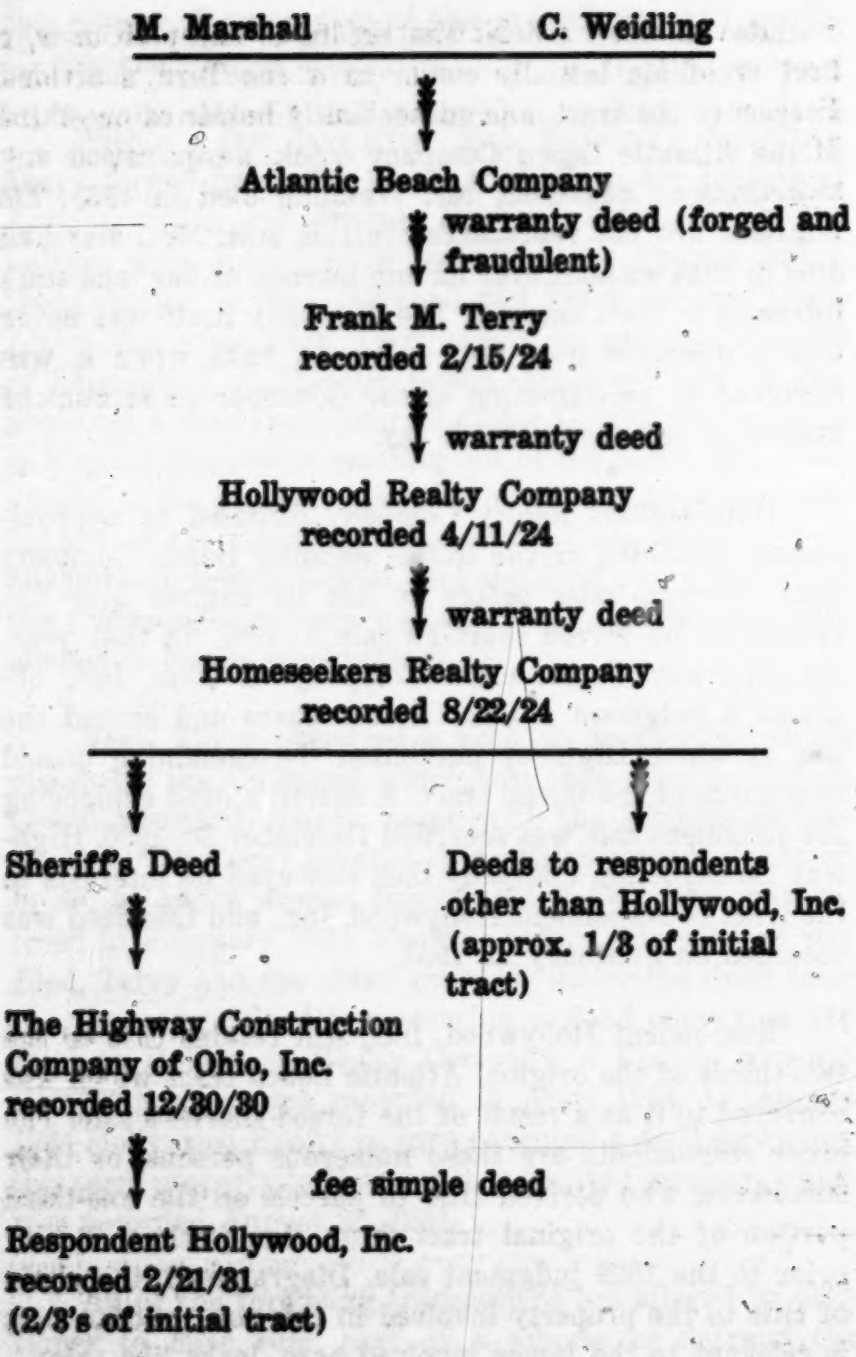
Next, Terry prepared a petition seeking an Order dissolving the Company which was then filed in Circ[illegible] Court, Broward County, along with the Minutes of Dissolution. The Court granted the petition since it appeared in order, and a decree dissolving the Company was entered in February 1924. The day before this petition was filed, Terry and the other grantees under the deed from the Company joined in executing a deed conveying the tract to Hollywood Realty Company, a Florida corporation. This deed was recorded in April 1924. In August 1924 Hollywood Realty in turn executed a deed conveying this same property to Homeseekers Realty Company, which was recorded August 22, 1924.

All of the foregoing transactions are alleged by petitioner to have been part of a scheme to defraud the

Mathew Marshall estate. The record is silent as to why Carl Weidling, initially owner of a one-third undivided interest in the tract, and subsequently holder of one-third of the Atlantic Beach Company stock, never raised any objections or questions. Mr. Weidling died in 1963; his interests are not represented in this suit. Mrs. Marshall died in 1945 without ever having learned of her husband's interests in the Company. The Company itself was never legally dissolved until September 14, 1936, when it was dissolved by proclamation of the Governor on account of failure to pay capital stock tax.

Homeseekers Realty Company disposed of approximately one-third of the initial Atlantic Beach Company tract through sales before it lost its control over the remainder by forced sheriff's sale in 1929. In that year, the Highway Construction Company of Ohio, Inc., obtained a judgment against Homeseekers and caused the sale at which Highway purchased the remaining unsold two-thirds of the initial tract. A sheriff's deed evidencing the judgment sale was recorded December 30, 1930. Highway Construction Company then conveyed its interests in the tract to respondent Hollywood, Inc., and this deed was recorded on February 21, 1931.

Respondent Hollywood, Inc., still retains title to the two-thirds of the original Atlantic Beach tract which was conveyed to it as a result of the forced sheriff's sale. The other respondents are those numerous persons, or their successors, who derived title to parcels on the one-third portion of the original tract from Homeseekers Realty prior to the 1929 judgment sale. Diagrammed, the chain of title to the property involved in this suit, insofar as it is relevant to the issues involved here, looks like this:


M. Marshall
C. Weidling
Atlantic Beach Company
warranty deed (forged and fraudulent)
Frank M. Terry
recorded 2/15/24
warranty deed
Hollywood Realty Company
recorded 4/11/24
warranty deed
Homeseekers Realty Company
recorded 8/22/24
Sheriff's Deed
Deeds to respondents other than Hollywood, Inc. (approx. 1/3 of initial tract)
The Highway Construction Company of Ohio, Inc.
recorded 12/30/30
fee simple deed
Respondent Hollywood, Inc.
recorded 2/21/31
(2/3's of initial tract)

It was not until November 1966, that petitioner, a brother of Mathew Marshall, uncovered Terry's actions. Petitioner obtained appointment as Administrator of the Marshall estate, and subsequently, in his capacity as Administrator, he filed his initial complaint on July 13, 1967. An amended complaint was filed on April 5, 1968.[1] The amended complaint sought a decree establishing the equitable interest of petitioner in the tract initially belonging to the Atlantic Beach Company, confirmation of the ownership of Atlantic Beach stock by petitioner, and also the appointment of a trustee for the Company who could convey legal title to the interest in the original tract to the heirs of Marshall.

Upon respondents' motion, the amended complaint was dismissed by final judgment with prejudice. The order of dismissal stated that petitioner's amended complaint failed to state a cause of action because the estate's claims were barred by operation of the Marketable Record Title Act, Ch. 712, F.S. The dismissal was appealed to the District Court. The issue framed on appeal was whether or not the Act applied to the claim of title asserted in petitioner's amended complaint in a manner which would extinguish the claim.

The arguments raised by the litigants before the District Court were similar to the arguments presented here. Petitioner asserted that dismissal by the Circuit Court was an error because: (1) the Legislature did not intend that such claims be barred by the Act; (2) the Act preserves case law which is inconsistent with dis-

[1]One object of the amendment of the complaint was to dismiss from the suit those respondents who had improved their portion of the original tract. Respondents here hold unimproved portions of the original tract.

missal; (3) the language of the Act does not support dismissal; (4) though the Act calls for a liberal construction, such construction cannot supersede restraints imposed by the Act itself.

Respondents contended that dismissal was proper because: (1) it comports with the Legislative intent behind the Act; (2) the Act goes beyond previous statute of limitations, curative acts, and recording acts, and, therefore, case law arising out of these prior enactments is not necessarily pertinent; (3) the language of the Act requires dismissal; (4) petitioner does not qualify under any of the exceptions provided for by the Act; (5) the Act would be totally deprived of meaning if dismissal were not granted.

The Florida Bar has been active in this case, both here and in the District Court, as amicus curiae because the Act was submitted to the Legislature by the Bar's Real Property, Probate and Trust Law Section, and this case represents its first reported construction. The Bar's position is that petitioner's interpretation of the Act and its effect is clearly erroneous. The Bar also presented arguments here and below regarding the constitutionality of the Act. However, we join with the District Court in declining to consider such arguments because the constitutionality of the Act was not framed as an issue in petitioner's amended complaint, which is the only complaint now before us. For purposes of disposing with this litigation, we will act on the assumption that the Act is constitutional.

The arguments which we have enumerated have been thoroughly explored and correctly analyzed by Judge Reed in the lucid and cogent opinion affirming the Circuit

Court dismissal which he prepared for the District Court below. There is little we could add to his opinion and, therefore, we will limit ourselves to the following remarks. The most persuasive argument of petitioner is that the Marketable Record Title Act preserves case law which is inconsistent with dismissal of petitioner's amended complaint. F.S. §712.07 states:

> "Nothing contained in this Act shall be construed to extend the period for the bringing of an action or for the doing of any other act required under any statute of limitations or to affect the operation of any statute governing the effect of the recording or the failure to record any instrument affecting land. This law shall not vitiate any curative act."

Petitioner asserts that by preserving the operation of statutes of limitations, and curative and recording acts, the Legislature intended that the Act must be construed in a manner consistent with these previous enactments and all case law interpreting them. In cases dealing with wild or forged deeds under these various acts, it has consistently been held, according to petitioner, that such deeds are void and of no effect even though they may have been recorded. As examples, petitioner cites **Reed v. Fain**, 145 So.2d 858 (Fla. 1961, **rev'd on rehearing**, 1962); **Poladian v. Johnson**, 85 So.2d 140 (Fla. 1955); and **Wright v. Blocker**, 144 Fla. 428, 198 So. 88 (1940). Therefore petitioner suggests that the Act cannot bar a complaint which demonstrates that the chain of title involved in a cause initiated out of a forgery or a wild deed, even though the forgery or the wild deed came into being more than thirty years before marketability was being determined.

The answer to this argument is simply that the Act in question goes beyond previous enactments and is in a category of its own. We quote with approval the following commentary. Boyer & Shapo, **Florida's Marketable Title Act: Prospects and Problems**, 18 U. Miami L. Rev. 103, 104:

> "The Marketable title concept is simple, although it has fathered many variations in draftsmanship. The idea is to extinguish all claims of a given age (thirty years in the Florida Statute) which conflict with a record chain of title which is at least that old. The act performs this task by combining several features, which generally are singly labeled as 'statutes of limitations,' 'curative acts,' and 'recording acts.'
>
> "The new act is in fact all of these: It declares a marketable title on a recorded chain of title which is more than thirty years old, and it nullifies all interests which are older than the root of title. This nullification is subject to a group of exceptions—including interests which have been filed for record in a prescribed manner.
>
> "The act is also more: It goes beyond the conventional statute of limitations because it runs against persons under disability. It is broader than the kind of legislation generally described as a curative act, because it actually invalidates interests instead of simply 'curing' formal defects. It also differs from a recording act by requiring a re-recording of outstanding interests in order to preserve them."

Also, Catsman, **The Marketable Record Title Act and Uniform Title Standards, III Florida Real Property Practice** (1965), §6.2:

> "The chief purpose of the act is to extinguish stale claims and ancient defects against the title to real property, and, accordingly, limit the period of search. **The act is different from a statute of limitations.** In a statute of limitations a claim of a **vested, present interest** is cut off because of the claimant's failure to sue. If suit is not filed, the claim is lost. By the Marketable Record Title Act, any claim or interest, vested or contingent, present or future, is cut off unless the claimant preserves his claim by filing a notice within a 30-year period. See §6.5. If a notice is not filed, the claim is lost. The act also goes beyond a curative act. Curative legislation only corrects certain minor or technical defects through the passage of time, whereas under the Marketable Record Title Act, most defects or clouds on title beyond the period of 30 years are removed and the purchaser is made secure in his transaction."

In view of the special nature of this Act and its special purpose, the assertion that its construction and application must be bound by precedents relating to less comprehensive acts does not make good sense and cannot make good law. The clear Legislative intention behind the Act, as expressed in F.S. §712.10, was to simplify and facilitate land title transactions by allowing persons to rely on a record title as described by F.S. §712.02, subject only to such limitations as appear in F.S. §712.03. To

accept petitioner's arguments would be to disembowel the Act through a case dealing with a factual situation of a nature precisely contemplated and remedied by the Act itself. This we cannot do.

In summary, although the Atlantic Beach Company/Terry deed initiating the chain of title involved here was forged, this deed formed but one link in the chain coming before the effective roots of title in this case as defined by the Act, i.e., transactions with either The Highway Construction Company or the Homeseekers Realty Company as grantors. Claims arising out of transactions, whether based upon forgeries or not, predating the effective roots of title are extinguished by operation of the Act unless claimants can come in under any of the specified exceptions to the Act. In this case, petitioner fails to qualify under any of the exceptions to the Act, and, therefore, petitioner's claims are barred.

The certified question involved in this cause was, in effect, whether the Marketable Record Titles to Real Property Act, Ch. 712, F.S. confers marketability to a chain of title arising out of a forged or wild deed, so long as the strict requirements of the Act are met. This question is answered in the affirmative.

The decision of the appellate court here reviewed having properly affirmed the decree of the lower court, the writ heretofore issued in this cause should be and it is hereby discharged.

It is so ordered.

ERVIN C.J., ROBERTS, DREW, ADKINS and BOYD, JJ., VANN, Circuit Judge, concur

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, 1970

CASE NO. 38,889

PETITION FOR RE-HEARING

E. E. MARSHALL, as Administrator de bonis non of the Estate of Mathew A. Marshall, deceased,
Petitioner,

vs.

HOLLYWOOD, INC., a Florida corporation, et al.,
Respondents.

COMES NOW, the Petitioner in the above-styled Cause, by his undersigned attorney, and being aggrieved by the Opinion of this Court entered on May 13, 1970, files this, his Petition for Re-Hearing, and as grounds therefor would show unto the Court:

1. Although the Court failed to recede from its former decisions in the cases of **Reid v. Fain**, 145 So.2d 858, (Fla. 1961 reversed) (on re-hearing in 1962); **Poladian v. Johnson**, 85 So.2d 140 (Fla. 155); and **Wright v. Blocker**, 144 Fla. 428, 198 So. 88 (1940), it nevertheless stated, on page 10 of its Opinion:

> "In view of the special nature of this Act and its special purpose, the assertion that its construction and application must be bound by precedents relating to less comprehensive acts does not make good sense and cannot make good law."

The "less comprehensive" act referred to is reported as Section 95.23, Florida Statutes, which reads as follows:

> "After the lapse of twenty years from the record of any deed or the probate of any will purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed or will, or their successors in title. After the lapse of twenty years all such deeds or wills shall be deemed valid and effectual for conveying the lands therein described, as against all persons who have not asserted by competent record title an adverse claim."

It will be noted by the Court that this "less comprehensive" act required that the deed be recorded in the Public Records. There was nothing in that "less comprehensive" act which required that the deed be rightfully recorded. Nevertheless, this Court, in the cases of **Reid v. Fain**, **Poladian v. Johnson** and **Wright v. Blocker**, supra, imposed the condition that forged, void or wild deeds were not entitled to recordation, and, therefore, the recordation of such deeds gave no notice to the public and did not cause Section 95.23, Florida Statutes to become operative.

Chapter 712, Florida Statutes, which this Court refers to as being more comprehensive, likewise required that the instrument relied on be recorded in the public records. We respectfully refer this Court to the following language in that Chapter:

> **712.01(3) Title transaction means any recorded instrument or court proceeding which affects title to any estate or interest in land.**

It is important that the Court bear this definition in mind for a claimant's title must depend upon his "root of title" which is defined in the Chapter as:

> 712.01(2) **Root of title means any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least thirty years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded.**

Thus we see that Chapter 712, Florida Statutes, just as Section 95.23, Florida Statutes requires that the deed relied on be recorded in the Public Records. This Court has taken superficial cognizance of the inclusion of Section 712.07 in the Chapter. That Section reads as follows:

> "Nothing contained in this law shall be construed to extend the period for the bringing of an action or for the doing of any other act required under any statute of limitations or to affect the operation of **any statute governing the effect of the recording** or the failure to record any instrument affecting land. This law shall not vitiate any curative statute."

This Section of Chapter 712, Florida Statutes obviously preserves the operation of recording acts and their meaning in a manner consistent with previous decisions of this Court as to what instruments can, or cannot, be entitled to be spread upon the public records. For th purpose of these proceedings, the deed from Atlantic Beach Company

to Frank M. Terry in 1924 is admittedly a forgery and under the decisions of **Wright v. Blocker** and **Reid v. Fain**, supra, was not entitled to be spread upon the public records, and the fact that it was wrongfully recorded gave no notice to the public nor created any right of title in Terry; it follows, therefore, that when Terry gave a deed to Hollywood Realty Company, that deed was a wild deed, since the conveyance was from a grantor, who had no right of record to convey. That wild deed, according to this Court's opinion in **Poladian v. Johnson** was not entitled to be spread upon the public records, and all subsequent deeds were likewise wild deeds which were not entitled to be spread upon the public records. It follows that none of such deeds constituted a "title transaction" because none of those wild deeds were entitled to be spread upon the public records, and therefore, none of those deeds could constitute a "root of title" under the meaning of the Act.

If this Court will remember, at the oral argument, I stated that in order for the Court to decide in favor of the Respondents, the Court must recede from its Opinions in **Reid v. Fain, Poladian v. Johnson** and **Wright v. Blocker**. A reading of this Court's Opinion dated May 13, 1970, shows that this Court has not receded from any one of the said Opinions, but has attempted to ignore the same by claiming that Chapter 712, Florida Statutes, is a more comprehensive act than Section 95.23, Florida Statutes. This statement is undoubtedly true, but, neverthless, each of the Statutes involved expressly require a recorded instrument, and since Chapter 712 specifically preserves the effect of the recording statute, it is in this respect more restricted than Section 95.23, Florida Statutes.

2. Unless this Court shall recede from its Opinion dated May 13, 1970, that Opinion will be an affirmative declaration that a wild deed, following a forged deed, is entitled to record and constitutes color of title. Such a declaration by this Court is nothing, more or less, than a blue print for land piracy. For example, a person could obtain a forged deed conveying vacant land to a straw man and have that straw man immediately convey the land to the pirate. Both of these deeds, being recorded, would entitle the land pirate to see to it that the land was taxed in his name and paying the taxes for seven (7) years he would have an absolute right to successfully maintain a suit to quiet title against the true owner. If this is what the Court intended to accomplish we can only say that the Opinion dated May 13, 1970 has, in fact, accomplished it.

3. We originally believed that this Court would, pursuant to the provisions of Section 7 of the Act, preserve and apply its decisions in **Wright v. Blocker, Reid v. Fain,** and **Poladian v. Johnson,** and that thus construed, the Act would be constitutional. However, the construction placed by this Court upon the Act, in holding that wild deeds may be title roots, renders the statute so unreasonable, arbitrary and capricious as to deprive Petitioner of property without due process of law and deny to him equal protection of the law in violation of Sections 2 and 9 of Article I of the Constitution of the State of Florida, Revised 1968, and of Section 1 of Amendment XIV to the Constitution of the United States.

I HEREBY CERTIFY that on this 27th day of May 1970, I mailed a true copy of the foregoing Petition to each attorney whose name is listed in the preface to this Court's Opinion entered on the 13th day of May 1970.

/s/ Garland M. Budd

GARLAND M. BUDD
Attorney for Petitioner
10122 N.W. 7th Avenue
Miami, Florida 33150
Telephone: 757-6800

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1970
TUESDAY, JUNE 30, A.D. 1970

CASE NO. 38,889

E. E. MARSHALL, as Administrator de bonis non of the Estate of Mathew A. Marshall, deceased,
Petitioner,

vs.

HOLLYWOOD, INC., a Florida Corporation, et al,
Respondents.

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:
SID J. WHITE
CLERK SUPREME COURT

(I have today mailed to the Clerk of the District Court of Appeal, Fourth District, Opinion of May 13, 1970, in the above cause)

APPENDIX D

695.01 F.S.A. Conveyances to be recorded

(1) No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

(2) Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts;

(3) Provided, however, that this section shall not apply to quitclaims heretofore made, the priority of which shall be contested by suit commenced within one year of the effective date of this law.

APPENDIX E

Chapter 712

MARKETABLE RECORD TITLES TO REAL PROPERTY

712.01 Definitions.
712.02 Marketable record title.
712.03 Exemptions.
712.04 Interests extinguished by marketable record title.
712.05 Effect of filing notice.
712.06 Contents of notice; recording and indexing.
712.07 Limitations of actions and recording acts.
712.08 Filing false claim.
712.09 Extension of thirty year period.
712.10 Law to be liberally construed.

712.01 Definitions.—As used in this law:

(1) The term person as used herein denotes singular or plural, natural or corporate, private or governmental, including the state and any political subdivision or agency thereof as the context for the use thereof requires or denotes.

(2) Root of title means any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least thirty years prior to the time when marketability is being determined. The effective date of the rest of title is the date on which it was recorded.

(3) Title transaction means any recorded instrument or court proceeding which affects title to any estate or interest in land.

History.—§, ch. 63-133

712.02 Marketable record title.—Any person having the legal capacity to own land in this state, who, alone or together with his predecessors in title, has been vested with any estate in land of record for thirty years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in §712.03. A person shall have a marketable record title when the public records disclosed a title transaction affecting the title to the land which has been of record for not less than thirty years purporting to create such estate either in:

The person claiming such estate; or

Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate, with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

History.—§2, ch. 63-133.

712.03 Exemptions.—Such marketable record title shall not affect or extinguish the following rights:

(1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the

root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests; subject, however, to the provisions of subsection (5).

(2) Estates or interests preserved by the filing of a proper notice in accordance with the provisions hereof.

(3) Rights of any person in possession of the lands, so long as such person is in such possession.

(4) Estates or interests arising out of a title transaction which has been recorded subsequent to the effective date of the root of title.

(5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights of way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.

(6) Rights of any person in whose name the land is assessed on the county tax rolls for such period of time as the land is so assessed and which rights are preserved for a period of three years after the land is last assessed in such person's name.

History.—§3, ch. 63-133.

712.04 Interests extinguished by marketable record title.—Subject to the matters stated in §712.03, such marketable record title shall be free and clear of all estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to the effective date of the root of title. All such estates, interests, claims or charges, however denominated, whether such estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void, except that this act shall not be deemed to affect any right, title or interest of the United States or Florida reserved in the patent or deed by which the United States or Florida parted with title.

History.—§4, ch. 63-133.

712.05 Effect of filing notice.—

(1) Any person claiming an interest in land may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the thirty year period immediately following the effective date of the root of title, a notice, in writing, in accordance with the provisions hereof, which notice shall have the effect of so preserving such claim of right for a period of not longer than thirty years after filing the same unless again filed as required herein. No disability or lack of knowledge of any kind on the part of anyone shall delay

the commencement of or suspend the running of said thirty year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

(a) Under a disability,

(b) Unable to assert a claim on his behalf, or

(c) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(2) It shall not be necessary for the owner of the marketable record title, as herein defined, to file a notice to protect his marketable record title.

History.—§5, ch. 63-133.

712.06 Contents of notice; recording and indexing.—To be effective, the notice above referred to shall contain:

(1) The name or description of the claimant and the name and particular post office address of the person filing the claim.

(2) The name and post office address of an owner, or the name and post office address of the person in whose name said property is assessed on the last completed tax assessment roll of the county at the time of filing, who, for the purpose of such notice, shall be deemed to be an owner.

(3) A full and complete description of all land affected by such notice, which description shall be set forth in particular terms and not by general reference, but if said claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in such recorded instrument, provided the same shall be sufficient to identify the property.

(4) A statement of the claim showing the nature, description and extent of such claim, except that it shall not be necessary to show the amount of any claim for money or the terms of payment.

(5) If such claim is based upon an instrument of record, such instrument shall be sufficiently described to identify the same, including reference to the book and page in which the same is recorded.

(6) Such notice shall be acknowledged in the same manner as deeds are acknowledged for record.

Such notice shall be filed with the clerk of the circuit court of the county or counties where the land described therein is situated, together with a true copy thereof. The clerk shall enter, record and index said notice in the same manner that deeds are entered, recorded and indexed, as though the claimant were the grantee in the deed and the purported owner were the grantor in a deed, and the clerk shall charge the same fees for recording thereof as are charged for recording deeds. In those counties where the circuit court clerk maintains a tract index, such notice shall be indexed therein.

The clerk of the circuit court shall, upon such filing, mail by registered or certified mail to the purported owner of said property, as stated in such notice, a copy thereof and shall enter on the original, before recording the same, a certificate showing such mailing. For mailing each such copy, the claimant shall pay the sum of fifty cents, in addition to the recording charges. If the notice names purported owners having more than one address, the person filing the same shall furnish a true copy for each of the several addresses stated, and the clerk shall send one such copy to the purported owners named at each respective address. Such certificate shall be sufficient if the same reads substantially as follows:

I hereby certify that I did on this _____, mail by registered (or certified) mail a copy of the foregoing notice to each of the following at the address stated:

_____

Clerk of the circuit court of
_____ county, Florida,

By _____
Deputy clerk

Failure of any purported owner to receive the mailed notice shall not affect the validity of the notice or vitiate the effect of the filing of such notice.

History.—§6, ch. 63-133.

712.07 Limitations of actions and recording acts.—Nothing contained in this law shall be construed to extend

the period for the bringing of an action or for the doing of any other act required under any statute of limitations or to affect the operation of any statute governing the effect of the recording or the failure to record any instrument affecting land. This law shall not vitiate any curative statute.

History.—§7, ch. 63-133.

712.08 Filing false claim.—No person shall use the privilege of filing notices hereunder for the purpose of asserting false or fictitious claims to land; and in any action relating thereto if the court shall find that any person has filed a false or fictitious claim, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party all damages that he may have sustained as a result of the filing of such notice of claim.

History.—§8, ch. 63-133.

712.09 Extension of thirty year period.—If the thirty year period for filing notice under §712.05 shall have expired prior to July 1, 1965, such period shall be extended to July 1, 1965.

History.—§9, ch. 63-133.

712.10 Law to be liberally construed.—This law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in §712.02 subject only to such limitations as appear in §712.03.

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1969

CASE NO. 2245.

E. E. MARSHALL, as Administrator de bonis non of the Estate of MATHEW E. MARSHALL, Deceased,
Appellant,

v.

HOLLYWOOD, INC., a Florida corporation, et al.,
Appellees.

Opinion filed june 30, 1969.

REED, J.

The appellant in this case, E. E. Marshall, as administrator of the estate of Mathew A. Marshall, deceased, has appealed from a final judgment of the Circuit Court in and for Broward County, Florida, dismissing with prejudice his second amended complaint. Appellant was the plaintiff in the trial court.

E. E. Marshall in his capacity as administrator of the estate of Mathew A. Marshall, deceased, filed his initial complaint in this cause on 13 July 1967. The complaint joined a multitude of defendants and sought relief relating to certain real property in Broward County, Florida, in which the defendants claim to have interests adverse

to that of the plaintiff. Ultimately the second amended complaint was filed on 5 April 1968. Upon motion, this complaint was dismissed by a final judgment which dismissed the cause with prejudice. It is from the final judgment of dismissal that the present appeal has been taken.

The following statement of facts is taken from the allegations in the second amended complaint. In 1913 the Atlantic Beach Company, a Florida corporation, acquired title to the real property involved in the suit. Mathew A. Marshall was one of the organizers of that corporation. At the time of his death on 31 December 1923 he owned 334 shares of its capital stock. He was then the president of the corporation and a director. The only other director and officer was Carl P. Weidling, the secretary of the corporation. Mr. Weidling owned the remaining 166 shares of stock in the corporation. No other stock was authorized or outstanding at the time of Mathew A. Marshall's death. Carl P. Weidling died in 1962.

On or about 1 February 1924 Louise L. Marshall, the widow and sole heir of Mathew A. Marshall, deceased, left Florida. At that time she had no knowledge that her deceased husband had owned stock in the Atlantic Beach Company at the time of his death.

Letters of administration were issued by the county judge for Dade County, Florida, to Louise L. Marshall dated 5 February 1924. These were issued pursuant to an application for letters bearing the forged signature of Louise L. Marshall. The application for letters made no reference to the stock in Atlantic Beach Company.

On 12 February 1924 a paper entitled "Minutes Of A Meeting Of The Stockholders Of Atlantic Beach Company" was signed and sworn to by Frank M. Terry. This paper purported to be minutes of a meeting on 6 February 1924 of the stockholders of Atlantic Beach Company at which all of the outstanding shares (500) were represented in person or by proxy. The minutes indicate that Frank M. Terry held a number of the shares individually and a proxy for a majority of the shares. One S. Grover Morrow was indicated as holding a proxy for four shares. Terry signed the minutes falsely pretending to be president of the corporation. These minutes were recorded in Deed Book 28 at page 222, public records of Broward County, Florida, on 12 February 1924. The minutes reflect a resolution of the stockholders authorizing the conveyance of all of the assets of the corporation to the stockholders thereof.

On 6 February 1924 Frank M. Terry executed a deed in the name of Atlantic Beach Company as president. The deed purported to convey all of Atlantic Beach Company's property to Frank M. Terry and the other individuals who purported to be—but were not—owners of all of the stock in the corporation. This deed was recorded on 15 February 1924 in the public records of Broward County, Florida. The deed is alleged to have been "falsely made and forged by Frank M. Terry..."

On 14 February 1924 Frank M. Terry and the other grantees under the deed from Atlantic Beach Company executed a deed to Hollywood Realty Company, a Florida corporation. This deed was recorded in the public records of Broward County, Florida, on 11 April 1924. This deed was alleged to be false, spurious, fraudulent, and forged.

On 6 August 1924 a deed was executed by Hollywood Realty Company to Homeseekers Realty Company, a corporation, and recorded in the public records of Broward County, Florida, on 22 August 1924. This deed was also alleged to be false, spurious and forged.

On 15 February 1924 the Circuit Court for Broward County, Florida, entered a decree dissolving the Atlantic Beach Company. This decree was based on the affidavit purporting to be signed by an attorney representing all stockholders of Atlantic Beach Company and falsely representing that he was authorized to seek the dissolution of the Atlantic Beach Company. The affidavit was false and the name of the attorney was forged thereon.

The foregoing transactions were part of a scheme to perpetrate a fraud on the estate of Mathew A. Marshall.

On 25 April 1929 The Highway Construction Company of Ohio, Inc. obtained a judgment against Homeseekers Realty Company. Following a levy and a sheriff's sale, a sheriff's deed to The Highway Construction Company was recorded on 30 December 1930. The deed purports to convey substantially all of the real property involved in this litigation.

On 21 February 1931 a deed from The Highway Construction Company of Ohio, Inc. to the defendant, Hollywood, Inc., was placed of record in the public records of Broward County, Florida.

Diagrammed, the chain of title to the real property involved in this lawsuit, insofar as it is relevant to the issues here involved, looks like this:

Atlantic Beach Company

↓ warranty deed (claimed to be forged and fraudulent)

Frank M. Terry
recorded 2/15/24

↓ warranty deed

Hollywood Realty Company
recorded 4/11/24

↓ warranty deed

Homeseekers Realty Company
recorded 8/22/24

↓

Deeds to defendants other than Hollywood, Inc.

Sheriff's Deed

↓

The High-way Construction Company of Ohio, Inc.,
recorded 12/30/30

↓ fee simple deed

Hollywood, Inc.
recorded 2/21/31

There were never any stockholders of the Atlantic Beach Company except Mathew A. Marshall and Carl P. Wolfling. The Atlantic Beach Company was never legally dissolved until 14 September 1936 when it was dissolved by a proclamation of the governor for failure to pay capital stock tax.

Defendant Hollywood, Inc. and all other defendants knew the deed to Terry, et al., to Hollywood Realty Company, and to Homeseekers Realty Company, was null and void.

The sheriff's deed to The Highway Construction Company of Ohio, Inc. was allegedly void because the judgment debtor (Homeseekers Realty Company) did not own title to the property. The deed is also void because the judgment on which the deed was based was, for various reasons, allegedly void.

The defendants other than Hollywood, Inc. claim interests under recorded instruments purporting to create the same from Homeseekers Realty Company. Hollywood, Inc., of course, claims under the recorded deed from The Highway Construction Company of Ohio, Inc.

Louise L. Marshall died in December 1945 without ever having learned of her husband's interest in the Atlantic Beach Company. The plaintiff, E. E. Marshall, a brother of the deceased, Mathew A. Marshall, did not discover any of the facts alleged in the second amended complaint until 1 November 1956.

The land involved in this litigation is wild, unimproved, and not in the possession of any of the defendants.

The second amended complaint demands a decree establishing the interest of the plaintiff in the aforesaid lands of the Atlantic Beach Company, a confirmation of the ownership of the stock by the plaintiff, as administrator of the estate of Mathew A. Marshall, deceased, and the appointment of a trustee for Atlantic Beach Company to convey the legal title to the real property to the heirs of Mathew A. Marshall.

The order which dismissed the second amended complaint stated that it failed to state a cause of action on the ground that the plaintiff's alleged claim affirmatively appeared to be barred by the Marketable Title Act, Section 712, F.S. 1967. The issue which has been presented by the parties to this appeal by briefs and oral argument is whether or not the Marketable Title Act applies to the claim of title asserted by the plaintiff in the second amended complaint and extinguishes the same.

The plaintiff, as administrator of the estate of Mathew A. Marshall, deceased, claims to own two-thirds of the stock of the Atlantic Beach Company in his capacity as administrator. As the owner of two-thirds of the stock in the Atlantic Beach Company, the plaintiff claims equitable title to two-thirds of the real property owned by the corporation at the time it was dissolved and that he and the other heirs of Mathew A. Marshall are entitled to the legal and equitable title to the said real property. See Trusman Fertilizer Co. v. Allison, Fla. 1955, 81 So.2d 736.

The plaintiff's theory is that Atlantic Beach Company, at the time it was dissolved, still owned the real property in question because the purported deed executed

in the name of that corporation by Terry to himself and others was void as a forgery. While there is some doubt as to whether or not the deed executed by Frank M. Terry pretending to be president of the Atlantic Beach Company may be classified as a forgery under the law of Florida, Green v. State, Fla. 1954, 76 So.2d 645, for the purposes of evaluating the second amended complaint, we will accept the plaintiff's characterization of the deed as a forgery and, as such, void. We think the plaintiff's conclusion that the deed was void under the facts alleged in the complaint is inescapable.

The Florida Marketable Title Act, Section 712.01, F.S. 1967, was enacted in 1963 and became effective September 1, 1963. It is undoubtedly the most important piece of legislation dealing with real property titles enacted in the State of Florida in many years. We will attempt to determine the legislative intent based upon the language used, the subject matter of the act and the purpose of the act. Realty Bond & Share Co. v. Englar, 1932, 104 Fla. 329, 143 So.152.

The purpose of the act is to simplify and facilitate land transactions by allowing persons interested therein to rely on a record title. Section 712.10, F.S. 1967. The purpose of the act is accomplished basically by the provisions of Sections 712.02 and 712.04, F.S. 1967. Section 712.02 reads as follows:

> "Any person having the legal capacity to own land in this state, who, alone or together with his predecessors in title, has been vested with any estate in land of record for thirty years or more, shall have a marketable record title to such estate

in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in §712.03. A person shall have a marketable record title when the public records disclosed a title transaction affecting the title to the land which has been of record for not less than thirty years purporting to create such estate either in:

"(1) The person claiming such estate; or

"(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate, with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed."

The word "affecting" as it is used in the second sentence of Section 712.02 in the clause "affecting the title to the land" does not carry the narrow meaning of "changing or altering". The word is used in the broader sense meaning "concerning" or "producing an effect upon". In this broad sense, even a void instrument of record "affects" land titles by casting a cloud or a doubt thereon. Clements v. Henderson, 1915, 70 Fla. 260, 70 So. 439; Brown v. Solary, 1896, 37 Fla. 102, 19 So. 161.

All parts of an act should be read together in an effort to achieve a consistent whole. Ideal Farms Drainage District v. Certain Lands, 1944, 154 Fla. 554, 19 So.2d 234. The interpretation which we give the word "affecting" as used in Section 712.02 attributes to it a meaning consistent with the sense in which the same word is used in Section 712.01 (3) in the definition of a "title transaction". "Title transaction" is defined as any recorded instru-

ment or court proceeding which affects title to any estate or interest in land. If the word "affects" in the definition of a title transaction is interpreted narrowly to mean a recorded instrument which actually transfers or modifies an estate or interest in land, this would exclude from the definition of a title transaction a recorded instrument which "purported" to transfer or modify an estate or interest in land, but which actually did not do so because of some defect or impediment. Such an interpretation would create an inconsistency within the definition of the term "root of title" because it is defined in Section 712.01 (2) in terms of a title transaction which purports to create or transfer an estate.

The first sentence of Section 712.02 states, "Any person ... who ... has been vested with any estate in land of record for thirty years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in Section 712.03." (Emphasis added.) The plaintiff argues that the use of the word "vested" in the first sentence of Section 712.02 indicates a legislative intent to apply the operative provisions of the act only to and in favor of a person who is in fact vested with some estate in land as distinguished from one who has an apparent estate in land. The plaintiff contends that the defendants never were vested with any estate in land because their predecessors in title had no estate. The defendants, therefore, are not entitled to the benefits of the act, and the act is not operative to bar the claim of the plaintiff.

We disagree with this construction placed upon the first sentence of Section 712.02 by the plaintiff. It ignores

the total language of the sentence and particularly the words "of record" used therein. Furthermore, since the purpose of the act is to allow persons to rely on the record title to real property, it would be inconsistent to construe the words "vested . . . of record" in that sentence in such a way as to require an inquiry behind the record. The plaintiff's construction would render the first sentence of Section 712.02 inconsistent with the more explicit definition of "marketable record title" which is contained in the second sentence of Section 712.02. In the second sentence, a marketable record title is defined as a title which is purportedly created by recorded instruments or court proceedings without reference to that which might be disclosed by facts outside the record title. We conclude, therefore, that Section 712.02 declares the existence of a marketable record title when a person is shown by the record to have been vested with any estate of land for thirty years or more. In our opinion the application of Section 712.02 is not conditioned upon an actual vesting of some estate or interest in a person claiming the benefit of the act.

Prior to the passage of the Marketable Title Act, the broadest statute purporting to cure titles to real property was sections 1 and 2, Chapter 10171, Laws 1925. These sections were codified as subsections (1) and (2) of Section 95.23, Florida Statutes, and read as follows:

> "(1) After the lapse of twenty years from the record of any deed or the probate of any will purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed or will, or their successors in title.

> "(2) After the lapse of twenty years all such deeds or wills shall be deemed valid and effectual for conveying the lands therein described, as against all persons who have not asserted by competent record title an adverse claim."

In Wright v. Blocker, 1940, 144 Fla. 428, 198 So. 88, Section 95.23, F.S.A., was held not to apply to a deed that was void by reason of a forgery of the grantor's name. In Reed v. Fain, Fla. 1961, 145 So. 2d 858, the Florida Supreme Court on rehearing held that §95.23, F.S.A., could not be applied to validate a deed executed in violation of the homestead provisions of Article X of the Florida Constitution of 1885. Based upon these decisions, the plaintiff here argues that the Marketable Title Act does not apply to a void deed to eliminate claims of title depending upon transactions antecedent to the void deed. We appreciate the logic of the plaintiff's argument; however, the Marketable Title Act differs in many respects from Section 95.23 which was before the Florida Supreme Court in Wright v. Blocker and Reed v. Fain, supra. Section 95.23 has no express exceptions. The Marketable Title Act does. The specific enumeration of exceptions to the act in Section 712.03 and the specific provision in Section 712.05 for the protection of valid claims indicates a legislative intent to exclude no other claims from extinction by the operation of Sections 712.02 and 712.04. Dobbs v. Sea Isle Hotel, Fla. 1952, 56 So.2d 341; Biddle v. State Beverage Department, Fla.App. 1966, 187 So.2d 65. For this reason, we do not believe that the rationale in Wright v. Blocker and Reed v. Fain, supra, is pertinent to the Marketable Title Act and hold that under the circumstances depicted by the second amended complaint, the act may be applied to validate a record title even though it may be based on

a void deed. Compare Wilson v. Kelley, Case No. 68-421, decided by the Florida Second District Court of Appeal on 14 May 1969 wherein it was held that the Marketable Title Act may be applied to a wild deed.

Section 712.02 correlates with Section 712.04. The first sentence of Section 712.04 states that ". . . such marketable record title shall be free and clear of all estates, interest. . . ." The phrase "such marketable record title" refers back to the marketable record title declared and defined in Section 712.02. The second sentence of Section 712.04 amplifies upon the claims which are rendered null and void by the marketable record title.

The allegations in the second amended complaint and the exhibits thereto affirmatively reveal "title transactions" which have been of record for not less than thirty years which purport to create a fee simple estate in the lands involved in this suit in the defendant Hollywood, Inc. and the predecessors in title of the other defendants. One such title transaction is the deed from Hollywood Realty Company to the Homeseekers Realty Company recorded on 22 August 1924. The other title transaction is the deed from The Highway Construction Company of Ohio, Inc. to defendant Hollywood, Inc. recorded 21 February 1961. The complaint affirmatively alleges that all of the defendants other than Hollywood, Inc. claim as successors in title under the deed to Homeseekers Realty Company. That nothing appears of record purporting to divest the defendants of their record title to the property is a necessary implication from the affirmative allegation that the defendants have present claims to the land in question. The defendants, therefore, appear from the allegations of the complaint to have a marketable record title as defined in Section 712.02.

Under Section 712.04 this title is cleared of all estates, interests, claims or charges whatsoever the existence of which depends upon any act, title transaction, event or omission that occurred prior to the effective date of the root of title. The deed from Hollywood Realty Company to Homeseekers Realty Company and the deed from The Highway Construction Company of Ohio, Inc. to Hollywood, Inc. are roots of title within the definition of Section 712.01(2). The plaintiff's claim depends on title transactions which occurred prior to the recording of those deeds. We, therefore, conclude that the allegations in the second amended complaint affirmatively indicate a marketable record title in the defendants as the same is defined by the act. And this marketable record title bars the plaintiff's claim unless the claim is exempt from marketability under either Section 712.03 or Section 712.05. Where the plaintiff has pled facts showing that his claim depends on transactions which occurred prior to the defendants' roots of title and a marketable record title in defendants, the plaintiff, to state a cause of action, was obligated to plead facts showing that his claim of title was not extinguished by the otherwise apparent application of the Marketable Title Act.

The plaintiff argues that the deed of record from the Atlantic Beach Company to Frank M. Terry, et al., being a void deed, conveyed nothing. From this premise, the plaintiff proceeds to the conclusion that all subsequent deeds under which the defendants in this case claim title were void and conveyed nothing. Therefore, contends the plaintiff, these deeds contained an "inherent defect" which was not cured or affected by the marketable record title. The plaintiff relies on the language of Section 712.03 (1) reading:

"Such marketable record title shall not affect or extinguish the following rights:

"(1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title. . . ."

The terms "defects inherent in the muniments of title" do not refer to defects or failures in the transmission of title, as the plaintiff's argument suggests, but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends. To accept the plaintiff's proposition would virtually nullify the act because it would preserve from extinction all claims arising out of defective deeds — no matter how far antecedent to the root of title. We accept as sound the view of Professor Barnett who wrote with respect to the exemption now under consideration:

"This exception apparently protects only those interests or claims disclosed by, or based on defects inherent in, the recorded transactions that form the links in the chain of title of the person claiming a marketable record title. The provision means only those links subsequent to and including the root of title itself, although this is not as obvious in the Model Act as in the Florida and Indiana Acts. For example, if the root of title is itself a forged deed, the act will not extinguish the interest of the person whose name appears as grantor therein, even though his interest 'depends upon [a] . . . transaction . . . that oc-

> curred prior to the effective date of the root of title' and is thus otherwise subject to extinguishment under section 3 of the Model Act. Similarly, the act will not eliminate the problem of forgeries in any link subsequent to the root of title, although it will extinguish the right of owners whose names were forged to links in the chain of title prior to the root. . . ." (Emphasis added.)

Barnett, Marketable Title Acts—Panacea or Pandemonium, 53 Cornell L.Q. 45, 67 (1967). The factual allegations of the complaint demonstrate no defect in the make up or constitution of the deeds previously identified as roots of title or in the subsequent muniments of title. The exemption, therefore, is inapplicable here.

There are no allegations of fact in the second amended complaint indicating that the plaintiff's claim of title is exempt from the effect of the marketable record title by any other provision of Section 712.03. Also there is no factual allegation which would demonstrate that the claim of the plaintiff to the title was preserved by a notice filed in accordance with Section 712.05. In our opinion these were essential allegations where the facts affirmatively alleged show that, but for such an exemption or filing, the plaintiff's claim would be extinguished by the marketable record title held by the defendants. It does not appear from the pleadings, the record, or the briefs, that the plaintiff by a further amendment to the second amended complaint could show that he made such a filing or that his claim was otherwise exempt; therefore, we conclude that the trial court was correct in dismissing the second amended complaint with prejudice.

Finally, the plaintiff contends that his cause of action is based on fraud. It did not accrue, therefore, until the fraud was discovered on or about 1 November 1966. Under Section 95.11 (5)(d), F.S. 1967, the plaintiff has three years from the discovery of the fraud within which to commence his action. The plaintiff's contention might be proper if this were an action against Mr. Terry for damages; however, in our opinion Section 95.11, F.S. 1967, does not apply to an action for the recovery of real property which is the essential nature of the plaintiff's claim.

Because of the great importance to the general public of the statute with which we are here concerned and the need of the bench and the bar for authoritative precedent dealing with the statute, it is our intention, upon receipt of proper application, to certify the decision under F.A.R. 4.5 (c)(6) as one passing upon a question of great public interest.

The judgment appealed is affirmed.

AFFIRMED.

CROSS, J., and MINNET, JAMES F., Associate Judge, concur.

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In the Supreme Court of the United States

October Term, 1970

No. 747

E. E. MARSHALL, Administrator of the Estate of MATHEW A. MARSHALL, deceased,
Petitioner,

vs.

HOLLYWOOD, INC., et al.,
Respondents.

ON PETITION FOR CERTIORARI

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA BY RESPONDENTS JOSEPH DIBARI; J. PETRUSELLI and VERA PETRUSELLI, his wife; G. DeCHIARO and MARY DeCHIARO, his wife; MILDRED GARBER and H. N. GARBER; LESTER LEHN; SIMON GARSINA and AMELIA GARSINA; RAYMOND MOHR and ALBERTA MOHR; RALPH E. LUEBBERS and VIOLA L. LUEBBERS; ROBERT G. SABELLA and LORRAINE T. SABELLA.

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PREFACE

The following abbreviations will be usd in this Brief:

1. P. B. — Page references to Petitioner's Brief
2. P. App. — Page references to Petitioner's Appendix to his Brief
3. The Florida Court — Supreme Court of Florida
4. The District Court — Fourth District Court of Appeal of the State of Florida
5. F. S. A. — Florida Statutes Annotated
6. The Act — Florida's Marketable Record Title Act (Chapter 712, F. S. A.)

QUESTIONS PRESENTED

Petitioner seeks determination of whether he has been denied due process and the equal protection of the law under the Fourteenth Amendment to the Constitution when, in a case of first impression, the Florida Court affirmed the ruling of the District Court that the rights of an owner of land were extinguished when said owner's name was forged to a deed which formed one of the links in a chain of title prior to the chain's determinative "root of title" by the operation of Florida's Marketable Record Title Act (Chapter 712, F. S. A.)—where such owner failed to bring himself within any of the stated exceptions to said Act.

In turn, your Respondents question whether any constitutional question exists as well as whether same was timely raised by the Petitioner.

STATEMENT OF THE CASE

While the facts of this case are stated fully in the decisions of both the District Court (224 So.2d 743, P. App. 33) and of the Florida Court (236 So.2d 114, P. App. 1), the Petitioner in his statement of the case contends that the District Court's holding was that Florida's Marketable Record Title Act *"conferred marketability on a chain of title BEGINNING with a forged deed"* (P. B. 4). Respondents disagree with this statement and assert that the District Court's decision (P. App. 33) contains no such holding. Respondents' chain of title *begins* not with the allegedly forged deed from ATLANTIC BEACH COMPANY to FRANK M. TERRY which was recorded on 2 February 1924. Rather, our chain *begins*, as with most Florida land, with the Treaty between Spain and the United States whereunder Spain "ceded" the Floridas to the United States. The District Court's opinion clearly discloses that the 2 February 1924 recorded deed to TERRY was not the "root of title" under Florida's Marketable Record Title Act.

The District Court held that this TERRY deed was nothing more than an instrument purporting to create an estate which appeared in the chain of title before the determinative "root of title" (just as the aforementioned Treaty with Spain precedes the operative roots of title in the subject land's chain).

What the District Court held was that

1. since Petitioner's Second Amended Complaint revealed title transactions recorded after the TERRY deed, including one on 22 August 1924

(deed from Hollywood Realty Company to Homeseekers Realty Company) and one on 21 February 1931 (deed from the Highway Construction Company of Ohio, Inc., to Hollywood, Inc.);

2. which title transactions had been of record for more than thirty (30) years when Petitioner filed his original Complaint on 13 July 1967—such allegations of the Petitioner's Second Amended Complaint disclosed the existence of determinative *"roots of title" which postdated the claimed forged TERRY deed* in the Respondents' chain; and, further,

3. since the Petitioner had alleged the Respondents all claimed an interest in the subject land as either the grantee or the successors in title of the grantee of these title transactions, the Petitioner had effectively PLEAD HIMSELF OUT OF COURT

4. where Petitioner failed to allege he fell under any of the exceptions to Florida's Marketable Record Title Act (Chapter 712, F. S. A.);

5. because the effect of the Act is to *extinguish all claims whatsoever which depend upon any Act that occurred prior to the effective date of such roots of title* (Section 712.04, F. S. A.—P. App. 28).

Thus, the holding of the District Court was that Florida's Marketable Record Title Act extinguished the rights of owners whose names were forged to a link in the chain of title prior to its "root of title" (as same is defined by the Act—see Sec. 712.01, F. S. A., P. App. 25).

This is the holding which the Supreme Court of Florida affirmed.

Petitioner admits he first raised the constitutional question on his Petition for Rehearing from the decision of the Florida Court. While Respondents agree as to the *stage of the proceedings* where Petitioner attempted to raise the constitutional question, the Respondents totally disagree that such question exists, much less that such question was timely raised by the Petitioner.

ARGUMENT

PART I — NO CONSTITUTIONAL QUESTION EXISTS

Florida's Marketable Record Title Act provides that ANYONE (not just Petitioner) who has ANY interest or claim in land arising out of ANY act, event or omission that occurred prior to the effective date of the land's "root of title" (which the Act defines as *ANY transaction purporting to create or transfer the estate claimed* which has been recorded at least thirty (30) years prior to the time when marketability is being determined—Section 712.01 (2), F. S. A., P. App. 25) shall have his interest or claim extinguished (Section 712.04, F. S. A., P. App. 28) unless such person files for recording a Notice of his interest or claim within said thirty-year period (Section 712.05, F.S.A., P. App. 28). Such notice is to be recorded in the County where the land described is located (Section 712.05, F.S.A., P. App. 29) and if so filed, the person filing same shall have his interest or claim preserved for up to thirty years (Section 712.03(2), F.S.A., P. App. 27). Such person or his heirs or assigns can thereafter continue to preserve such claim ad infinitum by the filing of successive notices of claim (Section 712.05(1), F. S. A., P. App. 28) until

someone obtains a judicial determination of the efficacy of such claim or interest from an appropriate tribunal.

Although the Florida Court followed the wording of the statute, and thus treated Petitioner and his circumstances as "anyone" within the meaning of the statute, the Petitioner claims a denial of his constitutional right to the equal protection of the laws.

Florida construes the "equal protection" clause of the Fourteenth Amendment to the Federal Constitution to mean that the rights of all persons must rest upon the same rule under similar circumstances (*State Ex Rel Vars* v. *Knott* (1938), 135 Fla. 206; 184 So. 752, 754. SEE ALSO *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459; 57 S.Ct. 838; 81 L.Ed. 1223.

Nowhere in his brief does Petitioner demonstrate that Florida's Marketable Record Title Act was construed under a different rule for the Petitioner than for anyone else under the same circumstances; namely, anyone's interest or claim would have been extinguished in the absence of their filing a Notice of Claim where such interest or claim depended upon an act or omission that occurred *prior* to a transaction which "purports to transfer" the estate claimed when said transaction has appeared on the public records for at least thirty years prior to the determination of marketability.

It is difficult to understand how a state court can be charged with a denial of equal protection of the law when, as here, the state court is construing for the very first time an act and follows the precise wording of the act as same applies to "anyone". It thus appears evident that

there is no denial of equal protection of the law insofar as your Petitioner is concerned inasmuch as the Act has never been construed before, much less construed differently for others than for the Petitioner.

Petitioner would also have this Court believe that he has been denied due process of the law because of a "capricious", "unreasonable" and "arbitrary" interpretation by the Florida Court of its Marketable Record Title Act. Having so labeled the ruling below, the Petitioner wholly fails to prove his contentions.

Petitioner claims that since the Marketable Record Title Act (Chapter 712, F. S. A.) was not construed as narrowly as Florida's twenty-year curative and limitations statute (Section 95.23, F. S. A.) the broader construction afforded the Marketable Record Title Act automatically results in what Petitioner claims to be a denial to him of due process.

What Petitioner's jurisdictional argument overlooks is that while the Marketable Record Title Act contains elements of a limitation statute, a curative act and a recording statute, it goes beyond all three such statutes in its interpretation. The Florida Court noted these distinctions in its decision and then went on to state:

> "In view of the special nature of this Act and its special purpose, the assertion that its construction and application must be bound by precedents relating to less comprehensive acts does not make good sense and cannot make good law. . . . To accept Petitioner's arguments would be to disembowel the Act through a case dealing with a

factual situation of a nature precisely contemplated and remedied by the Act. This we cannot do." (236 So.2d 114, 119 and 120)

This Court has long recognized limitation statutes to not be a denial of due process of law. *Wheeler* v. *Jackson*, 137 U. S. 245; 11 S.Ct. 76, 34 L.Ed 659.

While the constitutionality of Florida's Marketable Record Title Act has not been determined by any court, Florida has ruled constitutional a recording statute requiring certain contracts to buy land to be recorded *within six months of the enactment of the statute* in order to preserve rights under such contracts. *Mahood* v. *Bessemer Properties* (1944) 154 Fla. 710, 18 So.2d 775.

Florida's Marketable Record Title Act has an effective date of September 1, 1963 (Chapter 63-133, Section 12, *General Laws of Florida*, Vol. 1, Part One). Section 712.09, F. S. A., of this Act provides:

> "If the thirty-year period for filing notice under Section 712.05 shall have expired prior to July 1, 1965, such period shall be extended to July 1, 1965."

This provision of the Act afforded a grace period of upwards of two years in which to perfect otherwise expired claims at the time the Act was enacted. It thus afforded due process to all for it could reasonably be argued that if Florida has already ruled a grace period of six months to be constitutional in its *Mahood* case, *supra*, the two-year grace period of our Act would also be found constitutional; and the Act cannot be held to be so unreasonable, arbitrary and capricious in scope as to be a denial of due process.

So, too, it can be said (as the Florida Court did in its opinion herein, P. App. 13 and 14) that earlier interpretations under a narrower curative act have absolutely no precedents in either the construction to be given a Marketable Record Title Act (which act actually "invalidates" interests instead of simply "curing" formal defects) or in its constitutionality. This Court has long held that in the absence of a clear abuse of one's constitutional rights, it is obligated to follow the construction given state statutes by the state court. *Osborne* v. *State of Florida*, 164 U.S. 650, 17 S.Ct. 214, 41 L.Ed. 586. Since the Florida Court's ruling constituted a case of first impression on its Marketable Record Title Act and since Petitioner has failed to demonstrate the clear existence of a federal question, much less an abuse of his rights thereunder, this Court is obligated to follow the ruling below—even if it feels the state court rendered an erroneous decision on the facts before it. To do otherwise would confer upon the Petitioner the right to an unauthorized second appeal on the merits.

PART II—CONSTITUTIONAL QUESTION NOT TIMELY RAISED

When Petitioner first filed his Complaint, the Respondents plead the Marketable Record Title Act as the basis for dismissal of the Complaint. When the trial court granted the dismissal, the Petitioner became aware that a tribunal was construing this Act as a bar to his recovery even though at this motion to dismiss level the trial court had to accept as true his allegations that a certain deed in the Respondents' chain of title prior to the Act's operative "root of title" was a forgery. At this instance in time Petitioner became aware of how the Marketable Record Title Act was being construed to his set of circumstances.

This construction continued unvaried by the trial court when it dismissed Petitioner's Amended Complaint and when it later dismissed with prejudice the Petitioner's Second Amended Complaint. As noted by the District Court:

> "The Order which dismissed the Second Amended Complaint stated that it failed to state a cause of action on the ground that the plaintiff's alleged claim affirmatively appeared to be barred by the Marketable Title Act." (P. App. 39)

There being no question but that the trial court relied on the Act to bar Petitioner's claim, *the Petitioner should have questioned the constitutionality of the Act in his appeal to the District Court.* Petitioner did not do so. However, Petitioner did argue the applicability of Florida cases construing a curative act and the District Court, in affirming the ruling below, distinguished this curative act (Section 95.23, F. S. A.) from the Marketable Record Title Act and also distinguished Petitioner's cited *Wright* v. *Blocker* (1940) 144 Fla. 428, 198 So. 88 and *Reed* v. *Fain* (Fla. 1961) 145 So.2d 858 decisions from the facts of this case. These very decisions and act are what Petitioner advances to this Court to establish the lack of constitutionality of Florida's Marketable Record Title Act (Chapter 712, F. S. A.).

Faced with such adverse interpretation of what Petitioner felt to be an analogous statute and case law, did Petitioner question the Act's constitutionality when the Supreme Court of Florida granted Certiorari? He did not. Again, the Florida Court not only distinguished the cura-

tive act (Section 95.23, F. S. A.) and the cases which Petitioner cites herein as being persuasive of a denial of due process and of the equal protection of the law, but also the Florida Court followed the reasoning of the District Court that the Marketable Record Title Act under consideration was broader in scope than Petitioner's curative act and indicated that to follow the construction which Petitioner had consistently urged would "disembowel" the Act. Only after such *repeated rejection* of the very same statute and case law which Petitioner urges upon this Court, did Petitioner *raise for the first time* on rehearing the denial of his rights under the Fourteenth Amendment to the Constitution.

To support the timeliness of his raising of the constitutional question, Petitioner relies upon *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107, which holds that if a Federal question arises because of an *unexpected construction of a state statute* by the highest state court, the question is timely raised for purposes of review if presented in a petition for rehearing to that state court.

It is truly incredible that Petitioner can appear before this Court and assert that the Florida Court's ruling was totally unexpected when the very case law and statute on which Petitioner relies for establishing such "surprise ruling" were advanced unsuccessfully by the Petitioner before both the District Court and the Supreme Court.

What Petitioner chooses to overlook is that this Court stated in *State of Missouri* v. *Gehner*, 281 U.S. 313, 50 S.Ct. 326, 327,; 74 L.Ed. 870:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. *Ordinarily, it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more.* (Emphasis supplied)

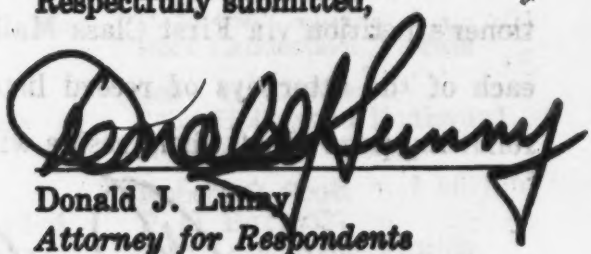
See also *Citizens' National Bank* v. *Durr*, 257 U.S. 99, 42 S.Ct. 15, 66 L.Ed. 149.

In short, the propriety of invoking a federal question for the first time on a petition for rehearing depends on whether the Petitioner should have anticipated the state court's ruling. *Herndon* v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530. When so viewed, Petitioner's "surprise ruling" evaporates. He *not only anticipated such a ruling but he argued against it at the trial court level, the District Court level and the Florida Supreme Court level.* Since any federal question was clearly not timely raised, this Court should clearly not entertain this Petition.

CONCLUSION

Petitioner has failed to properly invoke the jurisdiction of this Court and, accordingly, his Petition for Certiorari to the Supreme Court of Florida should be summarily denied.

Respectfully submitted,



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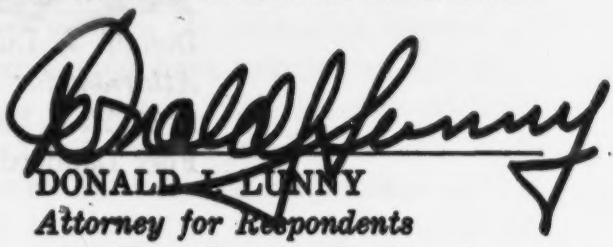
I hereby certify that pursuant to Paragraph 1 of Rule 33 of the Rules of Supreme Court of the United States, I have this 19th day of October, 1970, mailed copies of the foregoing Brief of Respondents in opposition to Petitioner's petition via First Class Mail, postage prepaid, to each of the attorneys of record listed below and on the following page all of whom reside within 500 miles of me.



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in the

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of the

United States

OCTOBER TERM, 1970

No. 747

E. E. MARSHALL, Administrator of the Estate of Mathew A. Marshall, deceased,

Petitioner,

vs.

HOLLYWOOD, INC., et al,

Respondent.

BRIEF OF RESPONDENTS, HOLLYWOOD, INC., SHERWOOD INVESTMENT CO., FRANCIS E. KANE AND JOANNA KANE, HIS WIFE, AND ALVIN KOHN, A SINGLE MAN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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MIAMI REVIEW — 371-4853 — 377-3721

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PRELIMINARY STATEMENT

In this brief we will refer to pages in the brief and petition of petitioner as "P.B. __" and to the appendix to the petition and brief of petitioner as "P.A. __".

No appendix is attached to this brief in opposition to granting the petition for certiorari.

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Florida sought to be reviewed, *Marshall vs. Hollywood, Inc., et al,* is reported in *236 So.2d 114* (P.A. A).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by virtue of writ of certiorari to the Florida Supreme Court by alleging that the Florida Supreme Court opinion and decision acted as a denial of equal protection of the laws and due process of law to Petitioner in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, Section 1, and United States Code Title 28, Section 1257 (3).

Accordingly, Respondents' brief will be limited to this narrow jurisdictional point raised by Petitioner.

FLORIDA STATUTE INVOLVED

The State Statute involved in this cause is *Chapter 712, Florida Statutes, Marketable Record Title Act* (P.A. E).

Although Petitioner states that Section 695.01, Florida Statutes (a recording statute relating to constructive notice to creditors and purchasers, P.A. D) is involved, none of the cases cited by Petitioner nor the Florida opinion which is sought to be reviewed refer to Section 695.01, Florida Statutes.

STATEMENT OF THE CASE

The statement of the case as presented by Petitioner outlines the facts alleged in his complaint which were deemed admitted for the purpose of this cause by Respondents' motion to dismiss, which motion was granted and from which unsuccessful appeals were taken. *Marshall vs. Hollywood, Inc., et al, Fourth District Court of Appeal of Florida, 224 So.2d 743*, and *Marshall vs. Hollywood, Inc., et al, Supreme Court of Florida, 236 So.2d 114.*

STAGE OF THE PROCEEDINGS WHICH RAISED FEDERAL QUESTION

Petitioner admits that the Federal question was raised for the first time in his petition for rehearing filed with the Clerk of the Supreme Court of Florida on May 28, 1970, a copy of which is annexed to Petitioner's appendix (P.A. B).

The Federal question raised by Petitioner was not timely raised, and is without merit as hereinafter stated.

ARGUMENT AMPLIFYING REASONS WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

I. *The Federal question was not timely raised* where same has been presented for the first time in a petition for rehearing to the Florida Supreme Court.

Petitioner has failed to come within the guidelines for the granting of a writ of certiorari under such circumstances as announced by this Court in *Herndon vs. Georgia,*

55 S.Ct. 794, 295 U.S. 441, 79 L.ED. 1530, 1532. The Georgia statute was assailed as contravening the due process clause, and this Court observed as follows:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."
> * * *
>
> "Petitioner, however, contends that the present case falls within an exception to the rule — namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."
> * * *
>
> *"The whole point, therefore, is whether the ruling here assailed should have been anticipated."*

Petitioner's request for rehearing (P.A. B) for the first time raised the matter of the application of the Constitution of the United States to Petitioner's cause; the

Supreme Court of Florida denied same without opinion. (P.A. C).

Accordingly, the Supreme Court of Florida never entertained any Federal question and made no attempt to decide it.

The Petitioner cannot claim that he comes within the exception to the above rule by claiming that the ruling of the State Supreme Court could not have been anticipated prior to the petition for rehearing.

Petitioner states that the Federal question first became apparent as the result of the opinion of the State Supreme Court in that it refused to follow previous decisions construing certain statutes other than the one herein involved, Chapter 712, the Marketable Record Title Act, and that it also placed a completely unanticipated and unconstitutional construction upon the Marketable Record Title Act.

The former opinions of the Supreme Court of Florida which Petitioner says it refused to follow are:

Wright vs. Blocker, (1940), 198 So. 88, (P.B. 7) Poladian vs. Johnson (1955), 85 So.2d 140 (P.B. 8) Reed vs. Fain (1962, 145 So.2d 858, (P.B. 8).

The record in this cause affirmatively shows to the contrary.

Petitioner's petition for rehearing (P.A. B, 18) shows that Petitioner had argued the application of these three cases in his oral argument before the Supreme Court of Florida:

> "If this Court will remember, at the oral argument, I stated that in order for the Court to decide in favor of the Respondents, the Court must recede from its Opinions in Reid v. Fain, Poladian v. Johnson and Wright v. Blocker."

The opinion of the Fourth District Court of Appeal, *Marshall vs. Hollywood, Inc., 224 So.2d 743, at page 750*, (P.A. F, 44), considered the case of *Wright vs. Blocker*, supra, and *Reed vs. Fain*, supra, at the intermediate appellate level. The opinion of the Supreme Court of Florida, after observing Petitioner's contentions that the Marketable Record Title Act must be construed in light of decisions prior to the enactment of said statute observed:

> "As examples, petitioner cites Reed v. Fain, 145 So.2d 858 (Fla. 1961, rev'd on rehearing, 1962); Poladian v. Johnson, 85 So.2d 140 (Fla. 1955); and Wright v. Blocker, 144 Fla. 428, 198 So. 88 (1940)."
>
> * * *
>
> "The answer to this argument is simply that the Act in question goes beyond previous enactments and is in a category of its own."
> *Marshall vs. Hollywood, Inc., 236 So.2d 114, p. 119* (P.A. A, 11 and 12).

Accordingly, it is apparent from the record brought to this Court that Petitioner not only anticipated but argued the construction of these same previous decisions of the Florida Supreme Court, and cannot now be heard to say that the present opinion had surprised him in its construction of the decisions of these prior cases.

II. *Petitioner has not been denied equal protection of the law.*

Petitioner quotes from the case of *Great Northern Ry. Co. vs. Sunburst Oil and Refining Co. (1932), 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360* (P.B. 6, 7) to the effect that a statute cannot be adjudged to mean one thing for some cases and another thing for others.

The Florida Supreme Court opinion below was the first time that Court had ever construed the Marketable Record Title Act, Chapter 712, Florida Statutes, and for this reason Petitioner cannot claim that it was construed one way for one person and another way for another person, because it is the only time it has been construed. Accordingly, Petitioner does not show that he has been denied equal protection of the laws.

III. *The Florida Supreme Court's construction of the Marketable Record Title Act is not a denial of due process of law.*

The Florida Supreme Court opinion in construing the Marketable Record Title Act in *Marshall vs. Hollywood, Inc., 236 So.2d 114*, begins on page 115 (P.A. A, 4 and 5):

> "We now review an application of the Marketable Record Titles to Real Property Act, Chapter 712, Florida Statutes."

It was the first time that the Marketable Record Title Act had been construed by the Florida Supreme Court, and had been considered one of great public interest and

certified by the Fourth District Court of Appeal to the Supreme Court of Florida so as to give it jurisdiction to pass upon the initial application and interpretation of the Marketable Record Title Act.

This Court early determined in *Osborne vs. State of Florida, 17 S.Ct. 214, 164 U.S. 650, 41 L.Ed. 586:*

> "The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own state."

Petitioner cites *Brinkerhoff-Faris Co. vs. Hill (1930), 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107.* At page 1113 of the Law Edition, this Court has determined:

> "*It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state;* that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, *does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.*"

Petitioner states that the Florida cases of *Wright vs. Blocker, 198 So. 88, Poladian vs. Johnson, 85 So.2d 140,* and *Reed vs. Fain, 145 So.2d 858* (P.B. 7, 8), interpret the

recording statute (Section 695.01, Florida Statutes) attached as P.A. D. A reading of these cases will indicate that a twenty year curative statute (Section 95.23) was involved in *Wright vs. Blocker* and *Reed vs. Fain*, infra, and not the recording statute relating to defining constructive notice to purchasers and creditors (Section 695.01, Florida Statutes). *Poladian vs. Johnson*, infra, does not purport to construe any statute by designation.

In any event, none of these cases attempted to construe the Marketable Record Title Act, Chapter 712, Florida Statutes, which was passed in 1963 and subsequent to such decisions, and certainly cannot be the basis of a claim that the Supreme Court of Florida has construed the Marketable Record Title Act other than as set forth in the opinion below.

Section 712.10, Florida Statutes (P.A. E 32) reads:

> "712.10 Law to be liberally construed.—This law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in §712.02 subject only to such limitations as appear in §712.03."

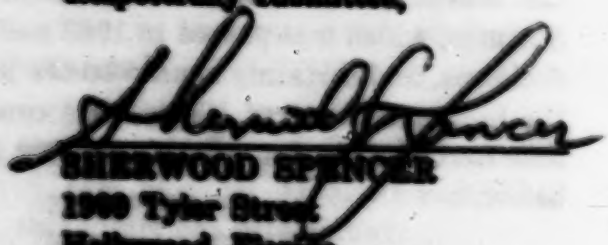
The decision of the Supreme Court of Florida in construing the Marketable Record Title Act is binding on all persons, and its decision does not confer appellate jurisdiction on this Court.

CONCLUSION

Wherefore, your Respondents respectfully show that Petitioner has failed to invoke jurisdictional grounds for the issuance of a writ of certiorari in this cause, and that his petition for writ of certiorari to the Supreme Court of Florida should be denied.

DATED at Hollywood, Florida, October 2, 1970.

Respectfully submitted,



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I hereby certify that pursuant to Rule 33, I have this 27th day of October, 1970, mailed copies of the foregoing Brief of Respondents in opposition to Petitioner's petition to each of the attorneys of record listed below, and on the following page.

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